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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 245

M. A. TILBURY,
DOING BUSINESS AS
TILBURY'S SOUTHERN MEAT COMPANY,
Petitioner

versus

WILLIAM J. ROGERS, REGIONAL DIRECTOR OF THE WAGE, HOUR AND PUBLIC CONTRACTS DIVISION, UNITED STATES DEPARTMENT OF LABOR, ET ALS.,
Defendants

And

M. A. TILBURY, doing business as
TILBURY'S SOUTHERN MEAT COMPANY
Petitioner

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR
Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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LECOMTE, SHREVEPORT, LOUISIANA

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Petitioner

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR
Defendant

TO THE HONORABLE
THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 220 Fed. 2d 757 (Advance Sheets, May 23, 1955), and

the opinion of the United States District Court for the Western District of Louisiana is reported in 123 Fed. Supp. 109. Copies therof appear in the printed Record at pages 80-89 Inc. and at pages 114.

GROUNDS FOR INVOKING JURISDICTION

The grounds for invoking the jurisdiction of this Court are, that the decision of the United States Court of Appeals in this case is apparently in conflict with the decision rendered by the Court of Appeals for the Sixth Circuit in *Hunter vs. Madison Avenue Corp.*, 174 Fed. 2d 164, in which case an application for a writ of certiorari was denied by this Court.

The jurisdiction of this Court is futher invoked on the ground that this case presents a situation where work and labor performed upon goods entering Interstate Commerce had no beneficial effect in preparing said goods or readying them for commerce, this being a case of first impression on this point.

The decision of the United States Court of Appeals sought to be reveiwed was rendered on April 21, 1955 (Record page 114). A rehearing was timely applied for and the Court of Appeals made its action final by denying such application on May 10, 1955 (Record page 119).

That paragraph 1 of Section 1254 of title 28 of the U.S.C.A. confers jurisdiction on your Honors in this case.

QUESTIONS PRESENTED

There are two questions presented in this case, First, whether the Fair Labor Standards Act is applicable where the work and labor on goods ultimately entering the stream of commerce had no beneficial effect in readying said goods for commerce, and, Second, whether the Fair Labor Standards Act applies where the employer's business is fundamentally intrastate in character; there are several intervening steps between the employee's work and the entrance of the goods into commerce; and only an inconsequential incident of Interstate Commerce has occurred.

STATUTES INVOLVED IN THE DISPOSITION OF THIS CASE

The disposition of this case involves the proper interpretation of the Fair Labor Standards Act, Title 29 Sections 201-219 inc. U.S.C.A. The pertinent provisions of the Act are set forth in an Appendix to this petition.

STATEMENT OF THE CASE

The present petitioner M. A. Tilbury, was advised by a representative of the Department of Labor that he owed some thousands of dollars in overtime wages to certain of his employees under the provisions of the Fair Labor Standards Act. He thereupon instituted a suit for a declaratory judgment seeking to ascertain whether his business was governed by the Act. (Record page 1)

Two of petitioner's former employees entered a counterclaim against him in that suit, (Record page 15) which, on motion of the Government was dismissed insofar as the Department of Labor was concerned. (Record page 22) In the meantime the Government instituted two suits against present petitioner, one seeking to recover wages for the use and benefit of certain employees (Record page 31) and the other to enjoin the defendant from violating the Act. This latter suit was dismissed and is not involved here. (Record page 88) These suits were consolidated for trial, resulting in a judgment in favor of the counterclaimants and in favor of the Government.

The facts are practically undisputed and so far as they bear upon the present petition they are as follows:

A

That the defendant is a wholesaler selling fabricated meat cuts, all of his sales of meat being within the State of Louisiana. (Record page 26)

B

That bones and inedible meats constitute .216 of one percent of petitioner's total dollar sales and 8 4/5 of his total tonnage. (Record page 57)

C

That the bones and inedible meats were sold locally to certain rendering plants which converted the products into meat scraps, cracklings, tankage and tallow, parts thereof being sold and delivered in Interstate Commerce. (Record pages 54 and 55)

REASONS FOR GRANTING THE WRIT

It cannot be denied and this petitioner does not deny, that where work and labor is performed upon goods beneficially preparing them for their entrance into the stream of commerce, that the persons performing the work are entitled to the benefits of the Act. But this petitioner does contend that where the work and labor, even if it be admitted that it was performed upon goods entering commerce, has no beneficial effect upon the goods and does not assist in preparing them for their final use, that the Act does not apply. There are scores of cases holding that the production of goods for commerce brings the employee within the orbit of the Act, but so far as we know there is no adjudicated case holding that where the work and labor was not necessary and helpful that the Act applies. In this case the employee's work consisted entirely of boning meat and preparing fabricated meat cuts. No work whatever was performed on the bones as such. The bones and inedible meat merely constituted refuse or garbage which was sold for an insignificant sum. The rendering plants acquiring this residue worked upon it, producing tankage and tallow. The articles so resulting would have been better for their ultimate purpose if the meat had been left upon the bones, and it is for that reason that this petitioner contends that the boning of the meat did nothing towards improving or readying the commodity for its ultimate use. On the contrary we suggest that the commodity in the absence of the employee's work would have been more valuable for the use to which it was ultimately put.

This petitioner also contends that this case is controlled by the principle enunciated in *Hunter vs. Madison Ave. Corp.*, (Sixth Circuit) 174 Fed. 2d 164. In that case the Court held that the labor which it was contended brought the employees within the purview of the Act was too many steps removed from the final entrance of the commodity into Interstate Commerce. The Court also held that when some inconsequential incident of Interstate Commerce resulted from the conduct of a fundamentally intrastate business, that the rule de minimis was applicable.

In this case, ninety nine and four fifths percent of petitioners dollar volume was derived from intrastate sales. Your Honors said in *Walling vs. Jacksonville Paper Co.*, 317 U.S. 564, that the intention of Congress was to leave local businesses to regulation by the states. It is clear that this is a fundamentally intrastate business and if a line is to be drawn this business is clearly one beyond the scope of the Act.

It is true that your Honors held in *Mabee vs. White Plains Publishing Co.*, 327 U.S. 178,that the rule de minimis did not apply there. We suggest however, that this case is distinguishable from the *Mabee* case because your Honors refused an application for a writ of certiorari in *Hunter vs. Madison Ave. Corp.* supra. We suggest that one distinction to be drawn between the *Mabee* decision and the case at the bar is that the employee's work in the cited case was beneficial and necessary to the confection of the commodity which entered Interstate Commerce. The newspapers produced by the publishing company could

not have come into being in the absence of the work done by the employees. In this case tankage, cracklings etc. would have resulted even if petitioner's employees had not deboned the meat.

CONCLUSION

In view of the fact that this is a case of first impression on one point and the decisions of two of the Courts of Appeals are in apparent conflict on the second point, we submit that the writ of certiorari herein sought, should be ordered to issue.

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APPENDIX A

Title 29, Sec. 203, U. S. C. A.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Title 29, Sec. 206, U. S. C. A.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:

(1) during the first year from the effective date of this section, not less than 75 cents an hour,

Title 29, Sec. 207, U. S. C. A.

(a) Except as otherwise provided in this section, no employer who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

APPENDIX "B"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15,409

M. A. TILBURY, doing business as
TILBURY'S SOUTHERN MEAT COMPANY
Appellant,

versus

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

(April 21, 1955.)

Before HUTCHESON, Chief Judge, and HOLMES, Circuit Judge.

PER CURIAM:

For the reasons stated by Judge Dawkins, Jr., in his opinion in these cases, and upon the authorities therein cited, the judgments appealed from are affirmed. These cases were by consent consolidated for trial in the court below with separate judgments to be entered in each case, which was done. The opinion of Judge Dawkins is reported in 123 Fed. Supp., pages 109-115.

Affirmed.

Statutes: Page

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of Oct. 20, 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*
Sec. 3(b) 2, 6
Sec. 3(i) 2, 6, 8
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 245

M. A. TILBURY, DOING BUSINESS AS TILBURY'S SOUTHERN MEAT COMPANY, PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 80-89) [1] is reported at 123 F. Supp. 109. The opinion of the Court of Appeals (Pet. App. B) is reported at 220 F. 2d 757.

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[1] Record references are to the petitioner's appendix to its brief in the Court of Appeals accompanying the petition for a writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered April 21, 1955. Petitioner's petition for rehearing was denied May 10, 1955. The petition for certiorari was filed July 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. 201 *et seq.*), are:

> Definitions
>
> Sec. 3 [52 Stat. 1061; 63 Stat. 911]. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.
>
> * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Maximum Hours

Sec. 7 [62 Stat. 912]. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

Prohibited Acts

Sec. 15 [52 Stat. 1068]. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

QUESTION PRESENTED

Whether employees, whose regular and unsegregated duties consist of boning, removing, or otherwise handling, bones and other inedibles which are shipped outside the State, are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, as amended, even though such goods constitute only a small proportion of the employer's total production.

STATEMENT

This action was brought by the Secretary of Labor[2] under Section 16(c) of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, pursuant to written requests by petitioner's employees to recover unpaid overtime compensation (R. 71-72) allegedly due and owing them.

Petitioner is engaged at Shreveport, Louisiana, in the wholesale distribution of meat, meat products and meat by-products, and employs a number of butchers and boners who are regularly engaged in cutting and boning meat in accordance with the

[2] By order of the District Court entered November 3, 1953, James P. Mitchell, the present Secretary of Labor, was substituted for Martin P. Durkin, resigned.

specifications and requirements of petitioner's customers (Dist. Ct. opinion, R. 80, 82, 83). In the butchering and boning operation, there results a residue of valuable by-products, such as bones and inedible portions of meat, which the butchers and boners regularly and necessarily handle or otherwise work on in the course of their employment (*id.*, R. 83). Such by-products are produced simultaneously with the preparation of meat cuts, and their production, therefore, involves practically all the working time of the butchers and boners (*id.*, R. 85). It was stipulated that it is a regular part of the duties of the butchers and boners to place such by-products in containers (Stipulation, R. 61 62), so that they may be easily collected. These by-products are regularly sold to a meat rendering firm, and all of them are shipped out of the State in the form of meat scraps, cracklings, tankage, animal food and tallow (Dist. Ct. Op., R. 83; Stip., R. 61, 62). For the two year period ending January 31, 1953, these by-products totaled approximately 210,764 pounds or approximately 8.45 percent of the total tonnage of meat products sold by petitioner, representing approximately $2,496.26 in sales value (Dist. Ct. Op., R. 84; Exh. A, R. 57). It was further stipulated, and the trial court specifically found, that petitioner "knew or had reason to believe" that these by-products would be shipped outside the State of Louisiana (Dist. Ct. Op., R. 83-84; Stip., R. 61-62).

The trial court found that the employees involved worked an average 56-hour workweek dur-

ing the period covered by the complaint and that they were not paid extra compensation for overtime as required by the Act. (R. 85-86).

On the basis of these undisputed facts, the district court concluded that the employees were substantially engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, citing this Court's decision in *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, and the Tenth Circuit's decision in *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236, certiorari denied, 318 U.S. 774, and directed that judgment be entered for plaintiff for recovery of underpayments to specified employees (Op. R. 80-89, Judgment, R. 96-97). Petitioner's motion for a new trial or rehearing was denied. (R. 91-92.) On appeal, the Court of Appeals for the Fifth Circuit affirmed *per curiam* for the reasons stated in the opinion of the district court. (Appendix B to Pet.). A petition for rehearing in the Court of Appeals was denied on May 10, 1955.

ARGUMENT

The decision below is correct; it accords with principles well settled by the decisions of this Court, and does not conflict with the decisions of any other Court of Appeals.

1. The work performed by petitioner's employees in connection with the inedible by-products falls squarely within the statute's definitions of "production of goods for commerce." Sections 3(b), 3(i), 3(j). It is settled that the Act extends at

least to the production of goods which the employer "intends or expects to move in interstate commerce." *United States* v. *Darby,* 312 U.S. 100, 118; *Warren-Bradshaw Co.* v. *Hall,* 317 U.S. 88.

There is no dispute that the employees work indiscriminately on the by-products as well as on the edible meat products (R. 85; R. 72-78), and that this work is regular, recurrent and unsegregated *(Id.).* The fact that petitioner's principal business is intrastate does not preclude the applicability of the Act, for this Court has made it clear that it is the character of the employees' work and not the character of the employer's business that is determinative of the Act's applicability. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Warren-Bradshaw Co.* v. *Hall,* 317 U.S. 88; *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564; *Overstreet* v. *North Shore Corporation,* 318 U.S. 125.

The fact that only a small percentage by value of petitioner's production moves out of the state does not establish that this production or the time devoted to it by the employees is not substantial. *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178; *United States* v. *Darby,* 312 U.S. 100; *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564.[3] Equally

[3] The decisions of the Courts of Appeals holding the Act applicable to employees of employers whose percentage of interstate production was similarly small, but regular and recurrent and unsegregated, are too numerous to list completely. For representative decisions see, in addition to the *Mabee, Darby* and *Peoples Packing Co.* decisions, *supra, Mitchell* v. *Royal Baking Co.,* 219 F.2d 532 (C.A. 5); *Foremost Dairies, Inc.* v. *Ivey,* 204 F.2d 186 (C.A. 5); *Chapman* v. *Home Ice*

without merit are petitioner's contentions that the bones and inedibles are merely residual "by-products," and that the work of petitioner's employees does not assist in "beneficially preparing" the goods for interstate commerce and is "too many steps removed from the final entrance of the commodity into Interstate Commerce" (Pet. 5-6). The definition of "goods" includes "products, commodities, * * * or articles or subjects of commerce of *any* character, or *any part or ingredient* thereof." Section 3(i) (emphasis added); *Western Union Telegraph Company* v. *Lenroot,* 323 U.S. 490; *Walling* v. *Peoples Packing Co.,* 132 F. 2d 236 (C.A. 10), certiorari denied, 318 U.S. 774. And goods are no less goods produced for commerce because further processing intervenes before shipment. *Schulte Co.* v. *Gangi,* 328 U.S. 108; *Walling* v. *Peoples Packing Co., supra.*

2. There is no conflict among the circuits. On the contrary, the decision below is in accord with the other decision of a Court of Appeals directly in point both factually and legally. *Walling* v. *Peoples Packing Co.,* 132 F. 2d 236 (C.A. 10), certiorari denied, 318 U.S. 774. There, as here, the employer's main business consisted of the dressing and sale of meat which was distributed within the State. Only the by-products, constituting but a small percentage of the goods handled or worked

Co. of Memphis, 136 F.2d 353 (C.A. 6); *Sun Publishing Co.* v. *Walling,* 140 F.2d 445 (C.A. 6), certiorari denied, 322 U.S. 728; *Schmidt* v. *Peoples Telephone Union of Maryville,* 138 F.2d 13 (C.A. 8); *New Mexico Public Service Co.* v. *Engel,* 145 F.2d 636 (C.A. 10).

on, were shipped in the interstate commerce by the rendering concerns to whom they were sold. The Tenth Circuit held that the employees in working on the carcasses, removing and handling the hides and offal, were performing the first step in the series of operations that produced the articles that went into commerce. Therefore, the employees were held to be engaged in the production of goods for commerce (132 F. 2d at 240).

Hunter v. *Madison Avenue Corporation,* 174 F. 2d 164 (C.A. 6), certiorari denied, 338 U.S. 836, is plainly inapposite here. The decision there rested on the ground that the work involved was simply maintenance of an ordinary office building like the building in *10 East 40th Street Building, Inc.* v. *Callus,* 325 U.S. 578, and was premised on the ground that the employer was not a producer of any goods. Also, unlike the situation here (R. 61-62, 83-84), it does not appear in the *Hunter* case that there was any showing that the defendant "knew" or "reasonably should have known" that the waste paper collected as an incident to cleaning the building would ultimately move outside the State.

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CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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